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In the Supreme Court of the United States

OCTOBER TERM, 1987

BURNEY A. PEACOCK, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

LEO L. SERGI
Colonel, Office of The Judge Advocate General
United States Air Force
Hq USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

and

FRANK J. SPINNER
Major, Office of The Judge Advocate General
United States Air Force

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EDITOR'S NOTE

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QUESTION PRESENTED

Was the petitioner denied due process of law as required by the Fifth Amendment, because the government failed to prove actual damage to military property, an essential element of the offense of which he was convicted?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional, Statutory and Regulatory Provisions	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Bouie v. City of Columbia, 378 U.S. 347 (1964)	6
Garner v. Louisiana, 368 U.S. 157 (1961)	6
Jackson v. Virginia, 443 U.S. 307 (1979)	4
Thompson v. City of Louisville, 362 U.S. 199 (1960)	5
United States v. Bangert, 645 F.2d 1297 (8th Cir. 1980)	5
United States v. Beneke, 449 F.2d 1259 (8th Cir. 1971)	5
United States v. Jenkins, 554 F.2d 783 (6th Cir 1977)	5
United States v. Manes, 420 F. Supp. 1013 (D. Oregon 1976)	5
United States v. Peacock, ACM 526889 (slip op.) (A.F.C.M.R. 1986), *aff'd*, 24 M.J. 410 (C.M.A. 1987)	*passim*
Vachon v. New Hampshire, 414 U.S. 478 (1974)	5
In re Winship, 397 U.S. 358 (1970)	4

Constitutions and Statutes:

U.S. Const. Amendment 5 5
10 U.S.C. § 867(h)(Supp III 1985) 1
18 U.S.C. § 1361 (1982) 2, 5
28 U.S.C. § 1259(3)(Supp III 1985) 1
Uniform Code of Military Justice:
Art. 67(b)(3), 10 U.S.C. § 867(b)(3) (Supp III 1985) 3
Art. 108, 10 U.S.C. § 908 (1982) 2, 3, 5
Art. 109, 10 U.S.C. § 909 (1982) 2, 5

Regulations:

Manual for Courts-Martial, United States, 1984,:
Paragraph 33c(2) 3, 5

In the Supreme Court of the United States

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No.

BURNEY A. PEACOCK, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Burney A. Peacock respectfully prays that a Writ of Certiorari issue to review the judgement of the United States Court of Military Appeals entered in his case on September 8, 1987.

OPINIONS BELOW

The *per curiam* decision of the United States Air Force Court of Military Review was issued on 2 January 1986. *United States v. Peacock*, ACM S26889 (slip op.) (A.F.C.M.R. 1986). That unreported decision is reproduced in the Appendix to this Petition. The decision of the United States Court of Military Appeals is reported at 24 M.J. 410 (C.M.A. 1987), and is reproduced in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h)(Supp III 1985) and 28 U.S.C. § 1259(3)(Supp III 1985). The judgement of the Court of Military Appeals was entered on September 8, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

18 U.S.C. § 1361 (1982) provides:

> Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows:
>
> If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000, or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100 by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

UNIFORM CODE OF MILITARY JUSTICE AND MANUAL FOR COURTS-MARTIAL PROVISIONS INVOLVED

Article 108 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 908 (1982) provides, in pertinent part:

> Any person subject to this Chapter who without proper authority—
>
> * * *
>
> (2) willfully or through neglect damages, . . .
>
> * * *
>
> any military property of the United States, shall be punished as a court-martial may direct.

Article 109, U.C.M.J., 10 U.S.C. § 909 (1982) provides, in pertinent part:

> Any person subject to this Chapter who . . . damages any property other than military property of the

> United States shall be punished as a court-martial may direct.

Paragraph 33c(2), Manual for Courts-Martial, United States, 1984, provides, in pertinent part:

> Damage consists of any physical injury to the property.

STATEMENT OF THE CASE

Petitioner was tried by a special court-martial, military judge alone, on 31 July 1985 at Kadena Air Base, Japan. Contrary to his pleas of not guilty, he was convicted of willfully damaging eight F-15 fuel tanks and negligently damaging one F-4 fuel tank, in violation of Article 108, Uniform Code of Military Justice, 10 U.S.C. § 908. The court sentenced him to be discharged from the service with a bad conduct discharge, confined for 30 days, and reduced to pay grade E-3. On 4 October 1985, the convening authority approved the sentence.

The United States Air Force Court of Military Review affirmed the findings and sentence on 2 January 1986. Upon discretionary review under Article 67(b)(3), U.C.M.J., 10 U.S.C. § 867(b)(3), the United States Court of Military Appeals affirmed on 8 September 1987. The sufficiency of evidence issue herein presented was raised before both lower courts without specific reference to the Fifth Amendment of the United States Constitution.

On 7 May 1985 the petitioner was assigned to the fuels branch of the 18th Component Repair Squadron (CRS) as the assistant non-commissioned officer-in-charge (NCOIC) and as the NCOIC of the tank farm. (R. 79-80). The tank farm consisted of auxiliary external fuel tanks used to extend the range of aircraft and was located in a building shared with the 18th Tactical Reconnaissance Squadron (TRS). (R. 48). Prior to the date of the incident, the petitioner felt a certain amount of animosity towards

personnel from the 18th TRS. Apparently, they were responsible for the shared building being cited for several safety violations. (R. 110). As a result of these problems, the petitioner desired to get the 18th TRS removed from the building. In an effort to effect this goal, he placed nuts, rivets and bolts in some of the stored tanks. Immediately thereafter, he reported it to his supervisor in the hope that personnel from the 18th TRS would be blamed for the incident, causing their removal from the building. In due course, the petitioner confessed to being the responsible party on 21 May 1986. (R. 20).

After the petitioner reported finding objects in the tanks, the objects were withdrawn by removing a valve and shaking them out. (R. 61). The tanks were thereafter x-rayed to insure that all objects were in fact removed. (R. 26). The government's evidence clearly established that there was absolutely no damage to the tanks as a result of the objects being placed in them. (R. 59, 71). In the words of one government witness: "It created no damage as I know damage; i.e., replacing materials or parts." (R. 71). The real delict of petitioner's conduct was that the objects, if not removed, presented a danger to any aircraft on which used. The use of a fuel tank with foreign objects in it could result in an uncommanded venting of fuel. (R. 151). The military judge, in finding the petitioner guilty, noted the petitioner's conduct impaired the value or usefulness of the tanks and therefore damaged them. (R. 140). He had previously denied a motion for a finding of not guilty based upon a failure to prove damage. (R. 98).

REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fifth Amendment to the United States Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. *In re Winship*, 397 U.S. 358 (1970); *See Jackson v. Virginia*, 443 U.S. 307 (1979). Where no

evidence appears in the record to support a conviction, to allow that conviction to stand constitutes a denial of due process of law. *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *See Vachon v. New Hampshire*, 414 U.S. 478 (1974).

This entire case turns on what constitutes "damage." If petitioner's definition is correct, then he has been denied the due process required in the cited cases. His claim is simple. He did not physically damage military property, nor was evidence presented in his case that he did. Article 108, U.C.M.J., does not define damage. Article 109, a companion article, involves damage to property other than military property. Addressing Article 109, the Manual for Courts-Martial, United States, 1984, at paragraph 33c(2), defines damage as "any physical injury to the property." This is a reasonable and clear definition and should be applied to Article 108. The military judge used a common dictionary definition that did not involve physical injury. The Air Force Court of Military Review did not address any definition. The United States Court of Military Appeals said, " 'damage' must be reasonably construed to mean any change in the condition of the property which impairs its operational readiness." *United States v. Peacock, supra* at 411.

The definition of damage applied by the Court of Military Appeals is not consistent with federal court decisions examining a comparable federal statute, 18 U.S.C. § 1361 (1982). In construing this statute, it has been held that proof of actual damage was required. *United States v. Bangert*, 645 F.2d 1297 (8th Cir. 1980); *United States v. Jenkins*, 554 F.2d 783 (6th Cir. 1977) (Legal fees incurred to evict prospective homebuyers not physical damage); *United States v. Beneke*, 449 F.2d 1259, 1262 (8th Cir. 1971)("In this case, actual damage to government property was a necessary element of the violation of 18 U.S.C. § 1361"); *United States v. Manes*, 420 F.Supp. 1013

(D. Oregon 1976)(Evidence that defendant cut government owned timber was insufficient to establish damage).

By broadening the definition of damage to fit the facts of petitioner's case, the Court of Military Appeals has acted arbitrarily and unreasonably. Criminal statutes are to be strictly construed and provide fair warning of the conduct proscribed. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

Furthermore, this Honorable Court should not be concerned with the possibility that the petitioner, by his conduct, may have committed some other crime, "for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." *Garner v. Louisiana*, 368 U.S. 157, 163-164 (1961).

CONCLUSION

Petitioner submits that he has suffered a denial of due process of law. Therefore, his petition for a writ of certiorari should be granted.

LEO L. SERGI
Colonel, Office of The Judge Advocate General
United States Air Force
Hq USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

and

FRANK J. SPINNER
Major, OTJAG
United States Air Force

NOVEMBER 1987

APPENDICES

UNITED STATES COURT OF MILITARY APPEALS

No. 54,566.
ACM S26889.

UNITED STATES, APPELLEE,

v.

BURNEY A. PEACOCK,
STAFF SERGEANT U.S. AIR FORCE, APPELLANT.

Sept. 8, 1987.

Accused, a staff sergeant in the United States Air Force, was convicted by special court-martial at Kadena Air Base, Japan, of willfully damaging eight fuel tanks and negligently damaging one fuel tank, in violation of article proscribing "damage" to military property, and he appealed. The United States Air Force Court of Military Review affirmed. Review was granted. The United States Court of Military Appeals, Sullivan, J., held that: (1) actual physical injury to military property of the United States was required by article proscribing "damage" of military property, but word "damage" had to be reasonably construed to mean any change in condition of property which impaired its operational readiness, and (2) accused's placement of foreign objects in fuel tanks that temporarily impaired tanks' operational readiness constituted "damage" under the article.

Affirmed.

For Appellant: *Captain Timothy J. Malloy* (argued); *Colonel Leo L. Sergi* (on brief).

For Appellee: *Major David F. Barton* (argued); *Colonel Kenneth R. Rengert* (on brief).

OPINION OF THE COURT

SULLIVAN, Judge:

On July 31, 1985, appellant was tried by a military judge sitting as a special court-martial at Kadena Air Base, Japan. Contrary to his pleas, he was found guilty of willfully damaging eight F-15 fuel tanks and negligently damaging one F-4 fuel tank, in violation of Article 108, Uniform Code of Military Justice, 10 U.S.C. § 908. The court sentenced appellant to a bad-conduct discharge, 30 days' confinement, and reduction to pay grade E-3. The convening authority approved the sentence and the Court of Military Review affirmed.

We granted appellant's petition for review to consider the following issue:

> WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION UNDER ARTICLE 108 BECAUSE THE GOVERNMENT FAILED TO PROVE ACTUAL DAMAGE TO GOVERNMENT PROPERTY AS A RESULT OF APPELLANT'S CONDUCT.

We hold that placing foreign objects in military equipment so as to temporarily impair its operational readiness constitutes damage under Article 108; accordingly, we affirm appellant's conviction and sentence. *See generally United States v. Ortiz*, 24 M.J. 164, 170-71 (C.M.A. 1987); *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983).

The record shows that appellant was the Noncommissioned Officer in Charge of a fuel-tank farm containing auxiliary external fuel tanks. Such tanks were utilized to extend the range of high performance aircraft and were essential to the mission of units operating those planes. The building containing the tank farm was occupied by appellant's unit, the 18th Component Repairs Squadron, and another unit, the 15th Tactical Reconnaissance Squadron (TRS). Appellant felt animosity for the latter

unit because he believed personnel of the 15th TRS were responsible for safety violations in the shared building.

On May 7, 1985, appellant inspected the building and found equipment improperly stored and not stored at all. According to his own testimony, he determined that it was "time that these people learned a lesson." He placed rivets and nuts in several auxiliary tanks, leaving others near the tanks to give the impression of "vandalism." His stated intent was to have the Tactical Reconnaissance Squadron removed from the building. Appellant admitted that he knew that the foreign objects would render the tanks unserviceable since the debris would cause an "uncommanded," *i.e.*, unexpected, dumping of fuel placed therein. Any aircraft using one of the tanks would also have its "down time" affected, thus impairing the mission of its unit.

Removal of the objects required 65.5 man-hours and cost the Air Force $1,309.49. During the process, the tanks were not available for use on missions. Otherwise, there was no damage to the tanks.

Appellant asserts that a conviction under Article 108 cannot be sustained unless the Government shows actual physical damage or injury to the property. He further contends that the temporary impairment of the use of the tanks evidenced in this case is not damage as intended in this statute. In support of this contention, he cites a number of cases purporting to construe a comparable federal civilian statute, 18 U.S.C. § 1361, in this manner. *E.g., United States v. Jenkins,* 554 F.2d 783 (6th Cir. 1977). We hold that actual physical injury to military property of the United States is also required under Article 108 but that such injury occurred when the interior placement of foreign objects disabled these tanks.

[1,2] Criminal prohibitions against damage, loss, or spoliation of military property and stores have a long history in military law. *See generally* G. Davis, *A Treatise on the Military Law of the United States* 364 (3d ed. 1913); W. Winthrop, *Military Law and Precedents* 557-59 (2d ed. 1920 Reprint). In enacting Article 108, Congress intended to consolidate the various articles of war protecting military property and to eliminate certain technical distinctions between them. *Uniform Code of Military Justice: Hearings on H. R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1230* (1949). In doing so, it intended to continue to offer special protection to military property because of its function or role in the national defense. *See United States v. Schelin, supra.* In light of the purpose of this statute, the word "damage" must be reasonably construed to mean any change in the condition of the property which impairs its operational readiness. *See United States v. Ortiz, supra.* Appellant's act of placing foreign objects in the fuel tanks impaired their utility to accomplish the mission of the Air Force just as much as if he had punctured these tanks or the tire of the aircraft which carried them.

Moreover, the decision in *United States v. Jenkins, supra,* a case decided under 18 U.S.C. § 1361, does not dictate a different result. *See generally* Art. 109, U.S.C. § 909. There, the accused received money from persons seeking housing and without authorization placed them in homes owned by the Department of Housing and Urban Development. The only loss to the United States was in the form of legal fees needed to evict the trespassers. The Court of Appeals held that no physical damage or injury to the property occurred in those circumstances. Here, the addition of the nuts and rivets to the fuel tanks actually changed the physical condition of the property, albeit only temporarily. *Cf. Edwards v. United States*, 361 F.2d 732 (8th Cir. 1966). Moreover the tanks themselves had to be

repaired to return them to their normal operational capabilities. *See* Part IV, para. 33(c)(2), Manual for Courts-Martial, United States, 1984. Accordingly, our interpretation of Article 108 is not inconsistent with analogous federal case law.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT and Judge COX concur.

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM S26889

UNITED STATES

v.

STAFF SERGEANT BURNEY A. PEACOCK, FR 427-02-1026
UNITED STATES AIR FORCE

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2 JAN 1986

Sentence adjudged 31 July 1985 by SPCM convened at Kadena Air Base, Japan. Military Judge: Gilbert J. Regan (sitting alone).

Approved sentence: Bad conduct discharge, confinement for one (1) month and reduction to airman first class.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Captain Timothy J. Malloy. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Major David F. Barton.

Before
FORAY, MURDOCK and O'HAIR
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the

substantial rights of the accused was committed. Accordingly, the findings of guilty and sentence are

AFFIRMED

OFFICIAL

/s/ CAROLE V. PETTI

Carole V. Petti
Clerk of Court
Court of Military Review

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